



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA-R02-OAR-2015-0509, FRL-9933-01-Region 2]

Approval and Promulgation of State Plans for Designated Facilities;
New York

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to withdraw its approval of a provision of the New York State plan that implements and enforces the Emission Guidelines for existing sewage sludge incineration units. This action would withdraw the EPA's approval of a provision of the State sewage sludge incineration plan allowing for affirmative defenses of Clean Air Act violations in the case of malfunctions. No other provision in the State plan would be affected by this action.

DATES: Comments must be received on or before [insert date 30 days from date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R02-OAR-2015-0509 by one of the following methods:

- www.regulations.gov. Follow the on-line instructions for submitting comments.
- E-mail: Ruvo.Richard@epa.gov
- Mail: EPA-R02-OAR-2015-0509, Richard Ruvo, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007-1866.
- Hand Delivery: Richard Ruvo, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007-1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:00 p.m. excluding federal holidays.

Instructions: Direct your comments to Docket ID No.

EPA-R02-OAR-2015-0509. The EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise

protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to the EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available at

www.regulations.gov or at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866. The EPA requests, if at all possible, that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the docket. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Anthony (Ted) Gardella (Gardella.anthony@epa.gov), Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-3892.

SUPPLEMENTARY INFORMATION: The following table of contents describes the format for the Supplementary Information section:

- I. What action is the EPA proposing today?
- II. Which provision of the State sewage sludge incineration (SSI) plan is EPA withdrawing approval of?
- III. Why is the EPA taking this action?
- IV. Who is affected by the State SSI plan and the amendment to the State SSI plan?
- V. What is the background for New York State's request to amend the State SSI plan?

VI. What approval criteria did we use to evaluate New York State's January 2015 request to amend the State SSI plan?

VII. What is the EPA's conclusion?

VIII. Statutory and Executive Order Reviews

I. What action is the EPA proposing today?

The EPA is proposing to withdraw its prior approval of an affirmative defense provision in New York State's SSI plan, based on a request submitted on January 27, 2015, by New York State. New York State submitted the State SSI plan for EPA approval on July 1, 2013 to fulfill the requirements of section 111(d) and 129 of the Clean Air Act (CAA). The EPA approved the proposed State SSI plan on June 11, 2014 (79 FR 33456). The State SSI plan adopts and implements the emission guidelines (EG) set forth at Title 40 part 60 subpart M of the Code of Federal Regulations (CFR) and is applicable to existing SSI units and establishes air emission limits and other requirements. Existing SSI units are units constructed on or before October 14, 2010.

II. Which provision of the State SSI plan is EPA withdrawing approval of?

New York State is requesting that the EPA withdraw its approval of a provision in the State SSI plan that allows for an affirmative

defense by an owner/operator of an SSI unit for violations of air emissions or other requirements of the State's plan in the event of malfunction(s) of an SSI unit. The EPA's proposed withdrawal of its prior approval, once finalized and effective, will result in the removal of the affirmative defense provisions from the federally-enforceable State SSI plan while maintaining the federal enforceability of the remainder of the State SSI plan for covered SSI units located in New York State.

III. Why is the EPA taking this action?

The EPA has determined that New York State's request that EPA withdraw approval of the affirmative defense provision in the State SSI plan meets all applicable requirements and therefore the EPA is proposing to withdraw its approval of that provision.

IV. Who is affected by the State SSI plan and the amendment to the State SSI plan?

The State SSI plan regulates all the units designated by the EG for existing SSI units and which are located at a wastewater treatment facility designed to treat domestic sewage sludge. If the owner or operator of a covered SSI unit made changes after September 21, 2011, that meet the definition of modification (see 40 CFR 60.5250), the SSI unit would become subject to 40 CFR part 60 subpart

LLLL (New Source Performance Standards for New Sewage Sludge Incineration Units), and the State SSI plan would no longer apply to that unit.

V. What is the background for New York State's request to amend the State SSI plan?

In an April 18, 2014 opinion, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) vacated an affirmative defense in one of the EPA's Section 112 regulations. NRDC v. EPA, 749 F.3d 1055 (D.C. Cir., 2014) (vacating affirmative defense provisions in Section 112 rule establishing emission standards for Portland cement kilns). The court found that the EPA lacked authority to establish an affirmative defense for private civil suits and held that under the CAA, the authority to determine civil penalty amounts in such cases lies exclusively with the courts, not the EPA. The vacated affirmative defense provision in the EPA's Portland cement MACT rule is identical to the affirmative defense provision in the EPA's SSI EG, promulgated on March 21, 2011, under sections 111(d) and 129 of the CAA, at §60.5181 ("How do I establish an affirmative defense for exceedance of an emission limit or standard during a malfunction?"). New York's State SSI plan adopted by reference all the applicable requirements of the EPA's SSI EG, including the affirmative defense provisions at §60.5181, into its

State plan at Part 200 of Title 6 of the New York Code of Rules and Regulations (6NYCRR) of the State of New York, entitled "General Provisions."

Because of the April 2014 D.C. Court vacatur referred to above, New York State submitted its January 27, 2015 letter requesting that EPA withdraw its approval of the affirmative defense provision as part of the State SSI plan submitted to the EPA for approval on July 1, 2013.¹ Consequently, the EPA is proposing to withdraw its prior approval of that particular provision of the State SSI plan as discussed herein.

VI. What approval criteria did we use to evaluate New York State's January 2015 request to amend the State SSI plan?

The EPA reviewed New York State's request against the applicable requirements of section 129(b)(2) of the CAA. To ensure consistency, the EPA reviewed New York State's request against the proposed Federal SSI plan, discussed in footnote 1 of this notice, which does not include an affirmative defense to violations that result from malfunctions.

¹ EPA has proposed a Federal SSI plan which would apply to SSI units that are not covered by an approved and effective state plan. The proposed federal plan does not include an affirmative defense to violations that result from malfunctions. 80 Fed. Reg. 23402, 23407 (Apr. 27, 2015).

VII. What is the EPA's Conclusion?

The EPA has determined that New York State's SSI plan will continue to meet all the applicable approval criteria if EPA withdraws its approval of the affirmative defense provision. First, the removal of the affirmative defense provision is consistent with the D.C. Circuit's decision in NRDC v. EPA, as described above. Second, a state plan must be at least as protective as the emissions guidelines promulgated by the EPA, and the removal of the affirmative defense provision from the approved state plan does not render the plan less protective, as it removes a potential defense to a violation resulting from a malfunction. Therefore, the EPA is proposing to withdraw its approval of that provision of the plan, which the EPA approved on June 11, 2014 (79 FR 33456) as part of New York's sections 111(d) and 129 State SSI plan for existing sewage sludge incineration units.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 40 CFR 62.04. Thus, in reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal

requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272

note) because application of those requirements would be inconsistent with the Clean Air Act; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The 111(d)/129 plan is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian Nation Land, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65FR67249, November 9, 2000).

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure,
Air pollution control, Aluminum, Fertilizers, Fluoride,
Intergovernmental relations, Paper and paper products industry,
Phosphate, Reporting and recordkeeping requirements, Sulfur oxides,
Sulfur acid plants, Waste treatment and disposal.

Dated: August 13, 2015. Judith A. Enck,

 Regional Administrator,

 Region 2.

[FR Doc. 2015-20904 Filed: 8/21/2015 08:45 am; Publication Date:
8/24/2015]